IN THE SUPREME COURT FOR THE STATE OF ALASKA

YVONNE ITO, Appellant, v. COPPER RIVER NATIVE ASSOCIATION, Appellee.	)	Supreme Court Case No. S-17965 Trial Court Case No. 3AN-20-06229 CI

BRIEF OF APPELLEE AHTNA' T'AENE NENE' (COPPER RIVER NATIVE ASSOCIATION) IN RESPONSE TO AMICI THE UNITED STATES OF AMERICA AND STATE OF ALASKA

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
HONORABLE DANI CROSBY

Richard D. Monkman
Alaska Bar No. 8011101
rdm@sonosky.net
Sonosky, Chambers, Sachse,
Miller & Monkman, LLP
302 Gold Street, Suite 201
Juneau, Alaska 99801
Telephone: 907.586.5880
Facsimile: 907.586.5883

Nathaniel H. Amdur-Clark
Alaska Bar No. 1411111
nclark@sonosky.com
Sonosky, Chambers, Sachse,
Miller & Monkman, LLP
302 Gold Street, Suite 201
Juneau, Alaska 99801
Telephone: 907.586.5880
Facsimile: 907.586.5883

Filed in the Supreme Court this _____ day
of April 2022.

CLERK OF THE COURT

By:_____
Deputy Clerk

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

Alaska Statutes

Other Authorities

AUTHORITIES PRINCIPALLY RELIED UPON

25 U.S.C. § 5381. Definitions

(a) In general

In this subchapter: . . . .

(5) Inter-tribal consortium

The term "inter-tribal consortium" means a coalition of two more separate Indian tribes that join together for the purpose of participating in self-governance, including tribal organizations.

. . . .

(8) Tribal share

The term "tribal share" means an Indian tribe's portion of all funds and resources that support secretarial programs, services, functions, and activities (or portions thereof) that are not required by the Secretary for performance of inherent Federal functions.

. . . .

(b) Indian tribe

In any case in which an Indian tribe has authorized another Indian tribe, an inter-tribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this subchapter, the authorized Indian tribe, inter-tribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this subchapter). In such event, the term "Indian tribe" as used in this subchapter shall include such other authorized Indian tribe, inter-tribal consortium, or tribal organization.

I. INTRODUCTION

Ahtna' T'Aene Nene', the Copper River Native Association ("CRNA"), thanks the Court for this opportunity to respond to the amicus briefs submitted by the United States and the State of Alaska. The Court requested that those briefs address "the extent to which an affirmance would render the appellee and similarly situated nonprofit organizations exempt from compliance with the State statutes and regulations and municipal ordinances."[1]

With the greatest respect, affirmance will *not* affect compliance by CRNA or other Title V tribal health organizations with State or municipal statutes, regulations, or ordinances, one way or the other. This case presents a contract claim brought by a former CRNA employee entirely within the context of CRNA's Indian Self-Determination Act Title V program.[2] No State or local laws are at issue. There is no "actual controversy" on that question here.[3]

How tribal sovereign immunity applies in relation to any State or local law is a highly fact specific and often legally complex question. *Cohen's Handbook of Federal Indian Law* devotes an entire chapter—nearly 100 pages—to the many variables and

[1] *Order* (Sept. 21, 2021), Dkt No. 42.

[2] *See* 25 U.S.C. §§ 5301-5423; Pub. L. No. 93-638, 88 Stat. 2203 (1975) (referred to variously by the courts and counsel as "the Self Determination Act," "ISDEAA," "ISDA," "Title V," or "P.L. 93-638").

[3] *See Jefferson v. Asplund*, 458 P.2d 995, 998 (Alaska 1969) (an "'actual controversy' [is] a prerequisite to the grant of declaratory relief" under both Alaska and federal law) (discussed further *infra*.).

different aspects affecting the "Tribal/State Relationship."[4] That relationship is particularly complex in Alaska, where P.L. 280,[5] the Alaska Native Claims Settlement Act,[6] the Indian Child Welfare Act,[7] the Indian Tribal Justice Act,[8] the Indian Self-Determination and Education Assistance Act,[9] the Indian Health Care Improvement Act,[10] the Alaska Native Village Alcohol Act,[11] the List Act,[12] the Alaska Native Allotment Act,[13] and even the Alaska Native Townsite Act[14] may come into play, depending on the facts of the particular situation presented.[15]

---

[4] Nell Jessup Newton et al., eds., *Cohen's Handbook of Federal Indian Law*, ch. 6 (2005 ed.),

[5] Act of Aug. 15, 1953, Pub. L. No. 83-280, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162).

[6] Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601–1629h).

[7] Pub. L. No. 95-608, § 2, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901-1963).

[8] Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified at 25 U.S.C. §§ 3601-3631); *see* 25 U.S.C. § 3601(4) ("Indian tribes possess the inherent authority to establish their own form of government, including tribal justice systems.").

[9] 25 U.S.C. §§ 5301-5423.

[10] Pub. L. No. 94-437, 90 Stat. 1400 (1976) (codified as amended at 25 U.S.C. §§ 1601-1685).

[11] Act of Mar. 3, 1873, ch. 227, 17 Stat. 510, 530.

[12] Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103–454, 108 Stat. 4791, 4791–92 (codified at 25 U.S.C. § 5131).

[13] Act of May 17, 1906, Pub. L. No. 59-171, ch. 2469, 34 Stat. 197 (repealed 1971).

[14] Act of May 25, 1926, Pub. L. No. 69-280, ch. 379, 44 Stat. 629 (repealed 1976).

[15] *See*, *e.g.*, *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977); *John v. Baker*, 982 P.2d 738 (Alaska 1999).

This matter, by contrast, presents a relatively straightforward question easily resolved by reference to a controlling federal statute and well-reasoned federal judicial decisions. As this Court has explained, "tribal immunity 'is a matter of federal law and is not subject to diminution by the States.'"[16] The Court need not, and should not, go beyond the controversy presented into speculative realms. Judicial prudence cautions "against issuing declaratory relief" on abstract or hypothetical questions:

> A claim . . . must present an actual controversy that is appropriate for judicial determination because it is definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.[17]

The United States' amicus brief accurately and cogently describes why and to what extent tribal sovereign immunity applies to the actual situation presented in this matter: a "quintessentially federal law" question.[18] The State of Alaska's amicus brief, by contrast, ignores the actual facts, mischaracterizes established law, and imagines an unlikely,

---

[16] *Douglas Indian Ass'n v. Central Council of Tlingit & Haida Indians of Alaska*, 403 P.3d 1172, 1176 (Alaska 2017) (cleaned up) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 789 (2014)).

[17] *Sagoonick v. State*, 503 P.3d 777, 799-800 (Alaska 2022) (cleaned up). *See also Borer v. Eyak Corp.*, No. S-17805, 2022 WL 983436, at *5 (Alaska Apr. 1, 2022) ("Alaska's declaratory judgment act requires there be an actual controversy for a court to issue declaratory relief. This requirement reflects a general constraint on the power of courts to resolve cases, cautioning that *courts should not resolve abstract questions of law*. Ripeness is an element of the actual controversy requirement." (emphasis added) (cleaned up)); *accord Kodiak Seafood Processors Ass'n v. State*, 900 P.2d 1191, 1195 (Alaska 1995).

[18] *See White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014).

hypothetical parade of horribles that have no relationship to this matter whatsoever. We discuss each amicus in turn.

II. UNITED STATES' AMICUS BRIEF

CRNA agrees with the United States that affirmance of this matter will not "expand" tribal sovereign immunity in Alaska,[19] and that the Superior Court's decision is correct for two independent reasons of federal law:

First, Congress made clear that CRNA, as an inter-tribal consortium compacting with the Government under Title V of the Indian Self-Determination and Education Assistance Act, has the "rights and responsibilities of [its] authorizing Indian tribe[s]."[20] Those rights include sovereign immunity from unconsented suit when carrying out Title V programs, services, functions, or activities.[21]

Second, CRNA is entitled to assert its authorizing tribes' sovereign immunity from unconsented suit because it is an "arm of the tribes" while carrying out its constituent tribes' Title V programs.[22] Contrary to appellant's position, that CRNA is organized as a

---

[19] *Brief for the United States as Amicus Curiae Supporting Appellee*, at 18 (Feb. 9, 2022) ("USA Brief").

[20] 25 U.S.C. § 5381(b) ("In any case in which an Indian tribe has authorized another Indian tribe, an intertribal consortium, or a tribal organization to plan for or carry out programs, services, functions, or activities (or portions thereof) on its behalf under this subchapter, the authorized Indian tribe, intertribal consortium, or tribal organization shall have the rights and responsibilities of the authorizing Indian tribe (except as otherwise provided in the authorizing resolution or in this subchapter). In such event, the term 'Indian tribe' as used in this subchapter shall include such other authorized Indian tribe, intertribal consortium, or tribal organization.").

[21] USA Br. 16–17.

[22] *Id*. at 25-27 (citing, *inter alia*, *White*, 765 F.3d 1010).

State non-profit corporation does not affect or diminish its right to assert tribal sovereign immunity.[23]

The United States' amicus brief focuses primarily on those points[24] and—as the Court considers those points—it is critical that the Court keep the larger context in mind. Congress has greatly expanded the role of Alaska tribal governments in providing federal health care services for Alaska Natives since enactment of the Alaska Native Claims Settlement Act ("ANCSA," 1971).[25] ANCSA was followed by the Indian Self-Determination and Education Assistance Act ("ISDEAA," 1975) and the Indian Health Care Improvement Act ("IHCIA," 1976).[26] These statutes were the catalyst that led to a monumental improvement in the quality and availability of health care for Alaska Natives and American Indians.

The Alaska Tribal Health System has since grown into a network of over 200 village health clinics, 7 tribally-operated regional hospitals, and the Alaska Native Medical Center in Anchorage,[27] providing health care and social services to roughly 175,000 Alaska

---

[23] *Id.* at 26.

[24] These points are also addressed in CRNA's Answering Brief at 15-25.

[25] 43 U.S.C. §§ 1601-1629h; *Yellen v Confederated Tribes of the Chehalis Rsrv.*, 141 S. Ct. 2434, 2439 (2021) ("In 1975, four years after ANCSA's enactment, Congress passed ISDA. 25 U.S.C. § 5301 *et seq.* ISDA answered the call for a "new national policy" of "autonomy" and "control" for Native Americans and Alaska Natives." (citing H.R. Doc. No. 91–363, p. 3 (1970); *Menominee Tribe of Wis. v. United States*, 577 U.S. 250, 252 (2016) ("Congress enacted [ISDA] in 1975 to help Indian tribes assume responsibility for aid programs that benefit their members").")

[26] 25 U.S.C. §§ 5301-5423 (ISDEAA); 25 U.S.C. §§ 1601-1685 (IHCIA).

[27] Brief of Amicus Curiae Dena Nena Henash (Tanana Chiefs Conference) at 11 (May 26, 2021 ("TCC Amicus Br.").

Natives, American Indians, and other eligible individuals across the State.[28] Alaska's tribes have accomplished extraordinary health care advances by pooling their resources in ISDEAA Title V inter-tribal consortia, like CRNA.[29] And, as the United States points out, Congress in Title V expressly declared that inter-tribal consortia are themselves considered "Indian tribes."[30]

Title V is a federal program which, this Court has observed, is part of the federal government's "unique relationship" with and support for Indian tribes.[31] The Alaska inter-

---

[28] Dep't of Health & Human Servs., Indian Health Serv., Alaska Area, https://www.ihs.gov/alaska/ (last visited Apr. 14, 2022); *see also* Paul Sherry, *Health Care Delivery for Alaska Natives: A Brief Overview*, Int'l J. of Circumpolar Health (2004), https://doi.org/10.3402/ijch.v63i0.17786.

[29] 25 U.S.C. § 5381(a)(5) ("The term 'intertribal consortium' means a coalition of two [or] more separate Indian tribes that join together for the purpose of participating in self-governance, including tribal organizations."). *See generally* TCC Amicus Br. 14. Alaska's Title V intertribal consortia are nonprofit organizations of federally recognized tribes that in many instances pre-date ANCSA and provided the basis for ANCSA regional boundaries. *See* 43 U.S.C. § 1606(a) ("For purposes of [ANCSA], the State of Alaska shall be divided by the Secretary within one year after December 18, 1971, into twelve geographic regions, with each region composed as far as practicable of Natives having a common heritage and sharing common interests . . . such regions shall approximate the areas covered by the operations of the following existing Native associations: . . . (12) Copper River Native Association . . . ."); CRNA, *Who We Are*, https://crnative.org/who-we-are/ (last visited March 25, 2022) ("CRNA is a Tribal Health Organization established through six compacted Ahtna Villages; Cantwell, Gakona, Gulkana, Kluti-Kaah [Copper Center], Mentasta and Tazlina. . . . More than 140 dedicated staff members are committed to providing exceptional health care to the entire Ahtna Region.").

[30] USA Br. 5 (citing 25 U.S.C. § 5381(b)).

[31] *E.g.*, *Fairbanks N. Star Borough v. Dena Nena Henash*, 88 P.3d 124, 134 (Alaska 2004) (describing Tanana Chiefs Conference's Title V programs, and stating "The unique relationship between the federal government and Indian tribes has long led the government to provide support to tribes for health, education, employment, irrigation, administration, and real estate services.").

tribal consortia carrying out Title V "serve[] a government function using federal funds from the Indian Health Service . . . to provide[] a wide range of medical, community health and other services for more than 175,000 Alaska Natives across the State."[32] The foundation of the Title V program in Alaska is the Alaska Tribal Health Compact, the momentous government-to-government agreement between Alaska tribes and tribal consortia and the United States Secretary of Health and Human Services.[33] The Compact is intended "to assure that all Alaska Natives have access to a comprehensive, integrated, and tribally-controlled health care delivery system."[34] CRNA is signatory to the Compact.[35]

A. Section 5381(b) Provides Statutory Confirmation of CRNA's Immunity.

As the United States correctly explains, 25 U.S.C. § 5381(b), provides an explicit federal statutory confirmation of CRNA's pre-existing right to assert sovereign immunity in this matter.[36] This is not an "expansion" of tribal sovereign immunity, as the State of Alaska and Ito argue.[37] Alaska's inter-tribal consortia are authorized by their constituent tribes to carry out the Title V programs that the tribes would otherwise carry out on their

---

[32] *Wilson v. Alaska Native Tribal Health Consortium*, 399 F. Supp. 3d 926, 934 (D. Alaska 2019) (cleaned up). *N.b*, current estimates are that the Alaska Tribal Health System's patient base is roughly 175,000 patients.

[33] *See, e.g.*, *Barron v. Alaska Native Tribal Health Consortium*, 373 F. Supp. 3d 1232, 1237 (D. Alaska 2019).

[34] *Wilson*, 399 F. Supp. 3d at 935 (citation omitted).

[35] Exc. at 80 (Alaska Tribal Health Compact).

[36] USA Br. 10–12.

[37] *See id*. at 18.

own, and the consortia are authorized to receive those tribes' "tribal shares," i.e., the federal funding each federally recognized tribe participating in a consortium would otherwise be entitled to receive if it separately carried out Indian Health Service programs under Title V.[38] With these funds comes the responsibility of operating Title V health programs for the consortium's constituent tribes.

Individual tribes' Title V funds are protected from unconsented suit by each tribe's right to sovereign immunity when the tribe itself carries out Title V programs.[39] In 25 U.S.C. § 5381(b), Congress expressly recognized that the right to tribal sovereign immunity continues when a group of tribes band together as a Title V consortium to operate those same programs. As the Superior Court held, "Congress granted discretionary tribal sovereign immunity to P.L. 93-638 organizations like [CRNA] when it gave them the same rights as their member tribes under 25 U.S.C. § 5381(b)."[40]

---

[38] 25 U.S.C. § 5381(a)(12) ("The term 'tribal share' means an Indian tribe's portion of all funds and resources that support secretarial programs, services, functions, and activities (or portions thereof) that are not required by the Secretary for performance of inherent Federal functions."); *see also, e.g.*, *Wilson*, 399 F. Supp. 3d at 936 (Alaska tribal consortium relies for funding "on 'tribal shares' authorized under ISDEAA for the benefit of Alaska Native people.").

[39] *See Douglas Indian Ass'n*, 403 P.3d at 1174 ("Under the doctrine of tribal sovereign immunity, an Indian tribe is immune from suit unless Congress has authorized the suit or the tribe has waived its immunity.").

[40] Exc. 199. The Superior Court correctly found that § 5381(b) controls in this matter. Exc. 195-196 ("The [United States] Supreme Court has described 'Congress's authority over Indian affairs as 'plenary and exclusive.' Federal legislation is binding on the States under the Supremacy Clause. '[W]here state law comes into conflict with federal law, the Supremacy Clause of the United States Constitution dictates that state law must always yield.' 'Conflict preemption occurs when a state law and a federal law are in conflict, either because compliance with both state and federal law is impossible or because the state law

The United States agrees with the Superior Court, and agrees that § 5381(b) "provides a statutory basis for dismissal of plaintiff's breach-of-contract claim,"[41] as the "rights and responsibilities" of the individual tribes referenced in that statute include "the right to the common-law immunity from suit traditionally enjoyed by sovereign powers."[42] As this Court emphasized in *Douglas Indian Association*, tribal sovereign immunity is a bedrock principle of federal Indian law and, critically, "is a matter of federal law":

> [T]ribal immunity is a matter of federal law and is not subject to diminution by the States. We have long held that federally recognized tribes in Alaska are sovereign entities entitled to tribal sovereign immunity in Alaska state court. We have explained that this immunity is motivated in significant part by the need to ensure that tribal assets are used as the tribe wishes, without threat from litigation.[43]

The *Douglas Indian* Association factors apply with force in this matter. Appellant's suit against CRNA exposes these tribal assets to both the "threat [of] litigation" and depletion of those assets.[44] This is not an illusory threat. Tribal assets and tribal land have

---

stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress.'" (first quoting *Tavares v. Whitehouse*, 851 F.3d 863, 869 (9th Cir. 2017); then quoting *Allen v. State, Dep't of Health & Soc. Servs., Div. of Pub. Assistance*, 203 P.3d 1155, 1161 (Alaska 2009))).

[41] USA Br. 10 ("[I]n Section 5381(b) Congress confirmed that an intertribal consortium like CRNA has the same 'rights' as the tribes that control and manage it, and plaintiff did not bargain for any immunity waiver. CRNA is therefore entitled to tribal sovereign immunity to bar this suit.").

[42] *Id*. at 11 (quoting *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1652 (2018).

[43] *Douglas Indian Ass'n*, 403 P.3d at 1176 (cleaned up).

[44] *Id.; see also* TCC Amicus Br. 17 ("Given the financial challenges that Alaska tribal health consortia must overcome, sovereign immunity is critical to ensuring that tribal health care funds are used for health care activities."); *id.* at 18 (describing other costs associated with litigation besides just legal fees..

been a target of litigants throughout the United States' history.[45] As Judge Holland found in *Matyascik*, which involved the legally indistinguishable Title V inter-tribal consortium for the North Slope:

> [The Arctic Slope Native Association's] core funding comes from tribally-authorized federal funding that it receives on behalf of its member tribes along with non-federal funds that it is able to collect due to its status as an ISDEAA organization providing health care services for the tribes. In other words, defendant's funding is money that the tribes would receive directly if they chose to operate individually, as ISDEAA allows. Thus, a judgment for damages against defendant would adversely affect its member tribes because funds would be diverted from health care services. The member tribes would not be insulated from financial harm simply because they might not be directly liable for an adverse judgment.[46]

Douglas reiterated that federal law controls in the area of tribal sovereign immunity.[47] Here, § 5381 is the controlling federal statute. To hold otherwise would require overruling not only *Douglas* but this Court's tribal immunity cases extending back decades,[48] and would contravene the United States Supreme Court's decisions in this

---

[45] *Id*. at 18 (during the last three years, litigants demanded over $2 million from TCC: "Nearly every such lawsuit was meritless."). *Cf.* Sean Frazzette, *The Scope of Tribal Immunity in Real Property Disputes*, 87 U. Chi. L. Rev. 1605, 1608 (2020) ("The history of tribal land in the United States is one of theft." (citing Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 Harv. L. Rev. 1787, 1796-97 (2019))).

[46] *Matyascik v. Arctic Slope Native Ass'n, Ltd*., No. 2:19-CV-0002-HRH, 2019 WL 3554687, at *5 (D. Alaska Aug. 5, 2019. The reference to "non-federal funds" refers to third party payment for health care services that the tribes are entitled to collect under Title V and IHCIA Section 206, 25 U.S.C. § 1621(e) ("Reimbursement from certain third parties of costs of health services").

[47] *Douglas Indian Ass'n*, 403 P.3d at 1176.

[48] *Id*.; *see also Atkinson v. Haldane*, 569 P.2d 151, 163 (Alaska 1977) ("Because of the supremacy of federal law, we are bound to recognize the doctrine of tribal sovereign immunity . . . ."); *John v. Baker*, 982 P.2d 738 (Alaska 1999); *Healy Lake Vill. v. Mt.*

area.[49] Perhaps for those reasons, appellant did not contest CRNA's § 5381(b) arguments before the Superior Court.[50]

To the extent that this Court chooses to entertain Ito's § 5381(b) arguments, despite her failure to preserve them for appeal, the United States' amicus briefing is material, relevant, and persuasive. As the United States explains:

> 1. Tribal sovereign immunity "is a foundational right of the tribes that run CRNA," and the "'rights and responsibilities' recognized by Section 5381(b) therefore include CRNA's right to tribal sovereign immunity to bar the former employee's suit."[51]
>
> 2. Congress's amendments to the Self-Determination Act in 2000 confirm that inter-tribal consortia such as CRNA "have the same 'rights and responsibilities' as the tribes themselves when operating pursuant to Title V and acting in the tribes' shoes."[52]
>
> 3. Congress's amendments were intended "to encourage and expend the use of consortia," and § 5381 "furthers that purpose by putting an intertribal consortia on the same footing as the federally recognized Indian tribes that control and manage it—giving such a consortium the same 'rights

---

McKinley Bank, 322 P.3d 866 (Alaska 2014); *McCrary v. Ivanof Bay Vill.*, 265 P.3d 337 (Alaska 2011).

[49] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014); *see also, e.g.*, *Worcester v. Georgia*, 31 U.S. 515 (1832); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.").

[50] Ito failed to raise her 25 U.S.C. § 5381(b) arguments before the Superior Court. "Generally, questions of whatever nature, not raised and properly preserved for review in the trial court, will not be noticed on appeal." *Harvey v. Cook*, 172 P.3d 794, 802 n.46 (Alaska 2007) (quoting 4 C.J.S. Appeal and Error § 292 (2007)).

[51] USA Br. 1.

[52] *Id*. at 5.

and responsibilities' as the tribes themselves would have if they chose to participate under Title V individually rather than collectively."[53]

4. § 5381 is unambiguous, but "[e]ven if there were ambiguity," Congress provided in 25 U.S.C. § 5321(g) that "each provision of [P.L. 93-638] and each provision of a contract or funding agreement shall be liberally construed" for the benefit of, and resolved in favor of, the tribes participating in Title V.[54]

5. Ito's proposed construction of § 5381 requires adding words to the statute, is contrary to multiple other principles of statutory construction, and is "particularly inappropriate" in light of § 5321(g)'s rule of construction quoted above.[55]

6. CRNA's Senior Services Program is identified in and is an integral part of its Title V program. Ito was employed as the Title V Senior Service Program's Director.[56] Under § 5381, CRNA thus has "the same immunity" that its constituent tribes would have "if they had been sued by a similarly situated plaintiff asserting a breach of contract."[57]

7. Section 5381(b) applies to a tribal consortium's performance of its Title V program, and does not apply to non-Title V activities or enterprises.[58]

8. In this matter, "it is uncontested that the plaintiff is suing CRNA for employment actions [CRNA] took in the course of carrying out [its] Title V compact. If the tribe itself could invoke sovereign immunity in those

---

[53] *Id*. at 12 (citing *Dille v Council of Energy Res. Tribes*, 801 F.2d 373, 376 (10th Cir. 1986)).

[54] *Id*. at 13 (quoting 25 U.S.C. § 5321(g)).

[55] *Id*. at 15-16.

[56] *Id*. at 7.

[57] *Id*. at 16.

[58] *Id*. at 17 ("[T]he immunity of an intertribal consortium under Section 5381(b) is limited to its performance of functions under Title V[.]"). An intertribal consortium might assert tribal sovereign immunity if sued in a matter unrelated to its Title V program, but that situation is not presented here. The Court should not address that hypothetical question on these facts. *See supra* note 17 (citing *Sagoonick v. State*, 503 P.2d at 799-800).

circumstances, then under Section 5381(b) an intertribal consortium may do so as well."[59]

9. Congress did not by § 5381 "expand sovereign immunity." Rather, it recognized and "promoted 'Indian sovereignty and self-governance' by allowing Indian tribes to form consortia that would share their immunity when carrying out functions under Title V, with the ultimate goal of furthering the tribes' ability to deliver health care services."[60]

In sum, the United States' amicus brief comprehensively explains that, by enacting 25 U.S.C. § 5381(b), Congress confirmed that CRNA is entitled to assert tribal sovereign immunity in this matter. CRNA agrees.

B. CRNA Is an Arm of its Constituent Tribes, and Shares in their Sovereign Immunity.

The United States next turns to the "arm of the tribes" test and this Court's decision in *Runyon*.[61] The United States agrees that under the federal analysis in *White* and *Breakthrough Management*, "CRNA is entitled to dismissal of plaintiff's suit" as an "arm" of its constituent tribes.[62] That same conclusion has been uniformly reached as to Alaska's other Title V inter-tribal consortia by the Ninth Circuit,[63] the United States District Court

---

[59] *Id*. at 17

[60] *Id*. at 18 (quoting *Bay Mills*, 572 U.S. at 788).

[61] *Runyon ex rel. B.R. v. Ass'n of Vill. Council Presidents*, 84 P.3d 437 (Alaska 2004). *Runyon* was not a Title V case, it involved AVCP's Head Start program. *Id*. at 438-39. AVCP did not assert 25 U.S.C. § 5381 as a basis for tribal sovereign immunity in *Runyon*.

[62] USA Br. 19. *See White v. Univ. of Cal*., 765 F.3d 1010, 1025 (9th Cir. 2014); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010).

[63] *Cole v. Alaska Island Cmty. Servs., Inc.*, 834 F. App'x 366, 367 (9th Cir. 2021).

for the District of Alaska,[64] and the Superior Courts in the First and Second Judicial Districts.[65] (In the Third and Fourth Judicial Districts, the Superior Courts have relied on 25 U.S.C § 5381(b) to dismiss actions against Title V inter-tribal consortia based on tribal sovereign immunity.[66])

The United States notes that since this Court decided *Runyon*, the "many other state and federal courts that have considered whether a given entity should be afforded arm-of-the-tribe status for sovereign immunity purposes have coalesced on [the] more flexible, multifactor approach" epitomized by *White* and *Breakthrough Management*.[67] The United States provides the following insights:

1. The "key distinction" between the multifactor approach and *Runyon* is that "a tribe's potential liability for satisfying a money judgment against the entity is but one of several factors, not a 'threshold requirement for immunity.'"[68]

---

[64] *Wilson v. Alaska Native Tribal Health Consortium*, 399 F. Supp. 3d 926, 936 (D. Alaska 2019); *Matyascik v. Arctic Slope Native Ass'n*, No. 2:19-cv-0002-HRH, 2019 WL 3554687, at *2–5 (D. Alaska Aug. 5, 2019); *Cole v. Alaska Island Cmty. Servs., Inc.*, No. 1:18-cv-00011-TMB, slip op. at 13–16 (D. Alaska Oct. 11, 2019) , ECF No. 32, *aff'd*, 834 F. App'x 366 (9th Cir. 2021); *Barron v. Alaska Native Tribal Health Consortium*, 373 F. Supp. 3d 1232, 1240 (D. Alaska 2019). The *White* approach is followed in other Ninth Circuit Districts. *E.g.*, *Manzano v. S. Indian Health Council*, No. 20-CV-02130-BAS-BGS, 2021 WL 2826072, at *6-10 (S.D. Cal., July 7, 2021) (immunity applies to similar Title V intertribal health consortium).

[65] *Bekkum v. Samuel Simmonds Mem'l Hosp.*, No. 2BA-15-97 CI (Alaska Super., June 19, 2015); *Mattoni v. Alaska Island Cmty. Servs. Inc.*, No. 1JU-18-715 CI (Alaska Super., June 30, 2019).

[66] *Beversdorf v. Tanana Chiefs Conference*, No. 4FA1701911, 2017 WL 7313414, at *2 n.10 (Alaska Super., Sep. 27, 2017); *Ito v. CRNA*, No. 3AN-20-06229CI (Alaska Super., Oct. 28, 2020) (this matter).

[67] USA Br. 21.

[68] USA Br. 21 (quoting *People ex rel. Owen v. Miami Nation Enters.*, 386 P.3d at 357, 366 (Cal. 2016).

2. The multifactor approach better promotes the "federal policies of tribal self-determination, economic development, and cultural autonomy" than does the *Runyon* single factor test.[69]

3. Relevant factors adopted by state and federal courts include:
   - whether the tribe(s) intended to share immunity with the entity
   - whether the entity's purpose is to promote tribal self-governance
   - tribal control over the entity
   - the financial relationship between the tribe(s) and the entity
   - the entity's method of creation[70]

4. "Collectively, these factors show that CRNA is an arm of its member tribes under a proper application of the test employed by most courts. Indeed, plaintiff does not appear to contest this point; her primary argument is that *Runyon* controls and the arm-of-the-tribe tests developed by other courts are irrelevant."[71]

5. The "method-of-creation" factor does not weigh strongly in favor or against immunity." "Although CRNA is incorporated under state law, it is recognized under federal law and operates pursuant to Title V to perform functions otherwise undertaken by sovereign tribes."[72]

6. Regardless of whether a tribe is "insulated" from financial liability by the state law corporate form, indirect costs of defending litigation and the diversion of resources from services to tribal members impose a financial burden on tribes and tribal programs, "even when the tribe is not directly financially responsible for a judgment against the entity."[73]

7. This Court observed in *Runyon* that the "overarching question [is] whether 'allowing suit against the entity will damage the tribal interests that immunity protects.'"[74] The tribal interests that immunity protects in this matter include protecting CRNA's financial ability to provide health

---

[69] *Id*. at 22 (quoting *Miami Nation*, 386 P.3d at 371).

[70] *Id*. at 21.

[71] *Id*. at 27.

[72] *Id*. at 26.

[73] *Id*. at 23.

[74] *Id*. at 27 (quoting *Runyon*, 84 P.3d at 440).

> care services, and furthering ISDEAA's "express policy of providing for consortia to deliver vital services that promote tribal self-governance."[75]

The United States correctly notes that appellant does not argue otherwise.[76] Indeed, Ito told the Superior Court that the federal courts "explicitly" do not follow *Runyon*'s approach, and forthrightly admitted that a ruling in appellant's favor would create two "wildly different" rules of law in Alaska:

> The fact is, *Runyon* cannot be reconciled with *White* and [the Superior] Court has no option except to follow *Runyon*. . . . In *Breakthrough* the 10th Circuit noted *Runyon* and explicitly elected not to follow it. This means that there are two different tests being applied to the issue of whether a non-tribe is entitled to tribal sovereign immunity: there is the *Runyon* test, which all Alaska state judges must follow, and there is the very different *White* test, which all federal judges in the 9th Circuit must follow.
>
> [The Superior Court] is duty-bound to follow precedent from the Alaska Supreme Court. This is not the first time that our two court systems have reached wildly different opinions on the same legal question, and it will likely not be the last.[77]

---

[75] *Id*. at 28 (citing *Bay Mills*, 572 U.S. at 789).

[76] *Id*. at 27.

[77] *E.g.*, Exc. 168 & n.20 (Appellant's Superior Court Brief) (citing, *inter alia*, *Native Vill. of Nenana v. Dep't of Health & Soc. Servs*., 722 P.2d 219 (Alaska 1986). But this Court later expressly overruled *Nenana*, *see In re C.R.H.*, 29 P.3d 849 (Alaska 2001), and Alaska now follows federal law in the area addressed by that case, *see State v. Native Vill. of Tanana*, 249 P.3d 734, 751-52 (Alaska 2011). In addition, the United States observes that "[w]hile plaintiff correctly notes that this Court is not bound by the decisions of federal courts of appeals, this Court should adopt the approach employed by those courts for the reasons outlined above [in the amicus brief], especially given the statutory framework of the Self-Determination Act." USA Br. 27. In fact, this Court has looked to the decisions of the federal Courts of Appeal and the District of Alaska when considering tribal sovereign immunity matters. *McCrary v. Ivanof Bay Vill.*, 265 P.3d 337, 341-42 (Alaska 2011) ("The U.S. District Court for the District of Alaska has held on multiple occasions that the Department has authority to recognize Alaska Native tribes. Federal courts of appeals have made similar statements. Commentators also acknowledge the Department's authority to recognize tribes. . . . Because Ivanof Bay is a federally recognized tribe, it is entitled to sovereign immunity." (footnotes omitted)).

In sum, the United States strongly encourages this Court to consider adopting the multi-factor approach used by the federal courts and other State courts. Alternatively, the United States contends, "even if this Court were to decline to adopt the predominant multifactor approach used in other federal and state courts, the Court should nevertheless find that *Runyon* supports CRNA's tribal sovereign immunity."[78] CRNA agrees.

III. STATE OF ALASKA'S AMICUS BRIEF

The State of Alaska maintains that it is "not advocating for shrinking the doctrine [of tribal sovereign immunity], but simply for maintaining the status quo and not expanding it."[79] But the status quo is that inter-tribal consortia carrying out ISDEAA Title V programs have tribal sovereign immunity from unconsented suits arising from operation of those programs—as every single state or federal court that has been presented with that question has found.[80]

The State of Alaska's briefing rests on a fundamental misunderstanding of the status quo, misapplications of federal law, and a long series of exaggerated hypothetical situations that are not presented and have no bearing whatsoever on this case. The State's brief is therefore of little benefit to the Court.

---

[78] USA Br. 27.

[79] *Brief of Amicus State of Alaska in Support of Appellant*, at 8 (Feb. 8, 2022) ("SOA Br.").

[80] *See supra* notes 65-68 (collecting cases).

A. Upholding the Superior Court Would Not Impede Enforcement of Applicable State Law.

In response to the Court's question, "the extent to which an affirmance would render the appellee and similarly situated nonprofit organizations exempt from compliance with the State statutes and regulations and municipal ordinances,"[81] the State of Alaska does not seriously contest the correct answer: affirmance would not make any difference whatsoever about whether CRNA and other Title V inter-tribal consortia are exempt from State statutes, regulation, or municipal ordinances.

Instead, the State trots out a series of hypothetical situations in which, according to the State, enforcement might be more difficult due to sovereign immunity.[82] For example, the State cites workers' compensation as "a good example,"[83] but CRNA and other Title V inter-tribal consortia uniformly participate in the State's workers' compensation program without any controversy.[84] And, importantly, workers' compensation is not at issue here. No facts are presented relating to workers' compensation and tribal programs, and there is no legal analysis concerning the complex interaction of the federal labor laws with the State's labor laws, including workers' compensation, in this context. The State's unfounded speculation is not justified or helpful to resolving this matter.[85]

---

[81] *Order* (Sept. 21, 2021).

[82] SOA Br. 9-12.

[83] *Id*. at 9.

[84] *See, e.g.*, *Douglas v. Alaska Native Tribal Health Consortium*, AWCB Decision No. 17-0022 (Feb. 21, 2017) (Appx. A).

[85] *Sagoonick*, 503 P.2d at 799-800.

Similarly, the State raises the specter that affirmance might make it more difficult for the State and local governments to collect taxes.[86] But CRNA and other inter-tribal consortia provide "non-profit religious, charitable, cemetery, hospital, or educational" services through their Title V programs,[87] and to the extent their properties are used for Title V purposes, those properties are already exempt from borough and municipal taxation.[88] Nor does the State explain what charitable gaming, corporate income, or tobacco taxes have to do with this case—even hypothetically.[89] Tribes and inter-tribal consortia do not conduct charitable gaming or sell tobacco as part of their Title V programs.[90] As non-profit organizations, CRNA and tribal consortia do not have "taxable income" subject to Alaska's minimal corporate income taxes.[91] And the State does not explain how environmental regulations, fish and wildlife regulations, gaming laws, alcohol

---

[86] SOA Br.10-11.

[87] *Fairbanks N. Star Borough v. Dena Nena Henash*, 88 P.3d 124, 130 (Alaska 2004) (quoting Alaska Const. art. IX, § 4).

[88] *See, id*. at 134-35; *Ketchikan Gateway Borough v. Ketchikan Indian Corp.*, 75 P.3d 1042, 1044 (Alaska 2003); *see also* AS 29.45.030(a)(3) (exempting "property used exclusively for nonprofit religious, charitable, cemetery, hospital, or educational purposes" from local taxation).

[89] SOA Br. 11.

[90] As with other non-profit organizations, inter-tribal consortia such as CRNA are "qualified organizations," *see* AS 05.15.690(39) authorized by Alaska law to operate "Games of Chance and Contests of Skill" in accordance with AS 05.15.010-.695. Nothing in this case would change the ability of the State to suspend or revoke a charitable gaming permit if an inter-tribal consortium violates the State's charitable gaming regulations, or to prosecute criminal violations.

[91] *See* AS 43.20.011.

or marijuana regulations, unfair trade practices law, data privacy laws, or anti-discrimination laws have any bearing on this Title V employment contract action.[92]

Moreover, to the extent any of these taxes or regulatory laws are applicable to CRNA or other similarly situated inter-tribal consortia, the State has ample means of enforcement. As the State admits:

> The State can seek damages against tribal employees in their individual capacity. The State can prosecute tribal employees for violating state criminal law. Finally, the State can likely seek prospective injunctive relief against tribal officials for violations of state law under *Ex parte Young*.[93]

In addition, the State admits that it regularly makes the receipt of State grants and other State funding contingent on waivers of sovereign immunity from tribes and tribal consortia.[94] Affirming the Superior Court would make no difference in the enforcement of any applicable State or municipal laws. Those issues are not presented, and any analysis or conclusion based on them would be entirely hypothetical.[95]

---

[92] SOA Br. 11. As federally funded contractors, CRNA and other Title V intertribal consortia are subject to extensive environmental regulation, including all Federal responsibilities under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370m-11, when carrying out construction products. *See* 25 U.S.C. § 5389(a). The State has not pointed to a single regulatory enforcement action that it has taken, or that it has even contemplated, that would be barred should this Court affirm the Superior Court.

[93] SOA Br. 12 (footnotes omitted).

[94] *Id.* at 12.

[95] *Sagoonick*, 503 P.2d at 799-800.

B. The State of Alaska Misunderstands and Misapplies *Lewis v. Clark*.

The State's brief relies extensively on the United States Supreme Court's decision in *Lewis v. Clarke*,[96] in which the Court determined that a suit brought against an employee of a tribal casino in his *personal* capacity was not barred by tribal sovereign immunity as a consequence of the Tribe's choice to indemnify the employee.[97] The State both misunderstands and misapplies this case. According to the State, "[a]lthough the Court analyzed whether a tribal *employee* had sovereign immunity rather than whether a tribal *entity* had sovereign immunity, the Court recognized that lawsuits against a sovereign's employee are similar to suits against a sovereign's instrumentality."[98] In fact, the Court recognized the exact opposite: "It is well established in our precedent that a suit against an arm or instrumentality of the State is treated as one against the State itself. We have *not* before treated a lawsuit against an individual employee as one against a state instrumentality, and Clarke offers no persuasive reason to do so now."[99]

To the extent that *Lewis v. Clarke* has any application to this matter, it confirms that an entity which is an arm of the tribe is immune from unconsented suit as a matter of federal law.[100] The question, then, is whether an entity is in fact an arm of the tribe. With respect to Title V inter-tribal consortia like CRNA, Congress categorically answered that question

---

[96] 137 S. Ct. 1285 (2017).

[97] *Id.* at 1291.

[98] SOA Br. 6-7.

[99] 137 S. Ct. at 1293 (emphasis added) (citing *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997)).

[100] *Id.* at 1289 (describing the Mohegan Tribal Gaming Authority as "an arm of the Tribe").

with "yes" in § 5381(b)—as have the many courts which have considered the question.[101] And for other entities, federal law provides a flexible, multi-factor test.[102] *Lewis v. Clarke* says nothing to the contrary.

C. Tribal Consortia Are Not Barred from Exercising Sovereign Immunity.

The State argues that "[i]t is very unlikely that a consortium made of multiple tribes can ever be shielded by tribal sovereign immunity."[103] This is nonsense. As this Court has explained, tribal sovereign immunity "is a matter of federal law."[104] The federal courts and State courts have had no difficulty concluding that legally indistinguishable Title V inter-tribal consortia are entitled to sovereign immunity.[105] This is nothing new or surprising.

---

[101] 25 USC § 5381(b); *see supra* notes 65-68 (collecting cases).

[102] *White v. Univ. of Cal.*, 765 F.3d 1010 (9th Cir. 2014).

[103] SOA Br. 15.

[104] *Douglas Indian Ass'n*, 403 P.3d at 1176.

[105] *See supra* notes 65-68 (collecting cases). The cases the State cites are not to the contrary. *See* SOA Br. 17 n.65 (citing dicta in *Somerlott v. Cherokee Nation Distributors*, *Inc*. 686 F.3d 1144, 1149-50 (10th Cir. 2012) and *State by & through Workforce Safety & Ins. v. Cherokee Servs. Grp., LLC*, 955 N.W.2d 67, 73 (N.D. 2021) (applying the *Somerlott* dicta)); s*ee also Rassi v. Fed. Program Integrators, LLC*, 69 F. Supp. 3d 288, 291 (D. Maine 2014) (analyzing *Somerlott* and explaining that "the Tenth Circuit's discussion of sovereign immunity in *Somerlott* was dicta."). *Somerlott* concerned a for-profit company, not a Title V inter-tribal consortium, and its discussion of tribal sovereign immunity relied on cases about for-profit corporations owned by the United States. 686 F.3d at 1150-51. However, corporations owned by the United States but incorporated under another's law *do* enjoy sovereign immunity when the corporation is formed (a) in furtherance of governmental objectives, and (b) the United States retains control. *See Wood ex rel. U.S. v. Am. Inst. in Taiwan*, 286 F.3d 526, 529, 534-35 (D.C. Cir. 2002) (holding that a corporation owned and controlled by the United States but incorporated under the law of the District of Columbia was an arm of the United States entitled to immunity from suit); *Lebron v. Nat;l R.R. Passenger Corp.*, 513 U.S. 374, 391-92 (1995) (noting that Amtrak,

The Ninth Circuit's seminal case of *Pink v. Modoc Indian Health Project, Inc*[106] upheld the exercise of sovereign immunity by a non-profit inter-tribal consortium formed as a corporation more than two decades ago. And in *Runyon*, this Court noted that "Tribal status similarly may extend to an institution that is the arm of multiple tribes, such as a joint agency formed by several tribal governments."[107] In contrast, the State has not cited to a single case in which a court (either State or federal) has suggested that sovereign immunity cannot extend to inter-tribal consortia.[108]

D. Affirming The Superior Court Would Not Expand Sovereign Immunity.

The State of Alaska argues that applying the plain language of 25 U.S.C. § 5381(b) to hold that an inter-tribal consortium retains the "rights and responsibilities" of its

---

a corporation owned by the United States and incorporated under the law of the District of Columbia was not entitled to sovereign immunity because Congress waived that immunity).

[106] 157 F.3d 1185, 1187–88 (9th Cir. 1998).

[107] *Runyon ex rel. B.R. v. Ass'n of Vill. Council Presidents*, 84 P.3d 437, 440 (Alaska 2004) (citing *Pink*, 157 F.3d 1185; *Dille v. Council of Energy Res. Tribes*, 801 F.2d 373 (10th Cir.1986)).

[108] The State's assertion "that nonprofits incorporated under state law, such as amici Alaska Native Tribal Health Consortium, . . . and Southeast Alaska Regional Health Consortium . . . do not have tribal sovereign immunity" is simply wrong. SOA Br. 18. It ignores explicit case law to the contrary. *See, e.g.*, *Wilson*, 399 F. Supp. 3d 926; *Cole*, 834 F. App'x 366. Incorporation under state law is not dispositive. *See, e.g.*, *McCoy v. Salish Kootenai Coll., Inc.*, 334 F. Supp. 3d 1116, 1120-23 (D. Mont. 2018 *aff'd*, 785 F. App'x 414 (9th Cir. 2019); *Manzano v. S. Indian Health Council*, No. 20-CV-02130-BAS-BGS, 2021 WL 2826072, at *6-7 (S.D. Cal. July 7, 2021).

constituent tribes "greatly expand[s] sovereign immunity" and is therefore in conflict with 25 U.S.C. § 5332.[109] The State is wrong.

First, the State gets the interaction between § 5381(b) and § 5332 backwards. With § 5381(b), Congress contemplated and intended that tribes may join together to create inter-tribal consortia, such as CRNA, for the purposes of carrying out federal programs, functions, services, and activities under Title V.[110] There is no question that a federally recognized tribe (or an arm of an individual tribe) would be entitled to sovereign immunity from suits arising out of the performance of Title V programs. Under the State's argument,[111] any tribe that takes advantage of Congress' invitation to form or participate in consortia would put its tribal assets at risk from unconsented lawsuits. That would be a clear diminution of tribal sovereign immunity foreclosed by § 5332: "Nothing in this chapter shall be construed as . . . diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe[.]"[112]

Second, the State is simply incorrect that the exercise of tribal sovereign immunity cannot be claim-specific.[113] For example, sovereign immunity bars monetary claims

---

[109] SOA Br. 28; *id.* at 27-32.

[110] *See also* USA Br. 18.

[111] SOA Br. 15.

[112] *See also* USA Br. 14.

[113] SOA Br. 29-30. The State's reliance on *Puerto Rico Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 873 (D.C. Cir. 2008) is misplaced. The Circuit's point there was that, once the multi-factor test for determining whether an entity is an arm of the state has been conducted, that test does not need to be re-litigated every time a new plaintiff sues. *Id.* at 872-79. Here, Congress statutorily confirmed the exercise of sovereign immunity for

brought against tribal employees in their official capacity,[114] but not suits for prospective injunctive relief.[115]

And finally, the State's argument that applying the plain language of § 5381(b) would expand tribal sovereign immunity to for-profit ANCSA corporations "regardless of the nature of the suit"[116] is a red herring and wrong. Unlike federally recognized tribes and arms of federally recognized tribes (like CRNA and similarly situated Title V inter-tribal consortia), ANCSA corporations are "private corporations[s], not . . . governmental entit[ies]."[117] They are not entitled to sovereign immunity.[118] As the United States Supreme Court recently confirmed, Congress' inclusion of ANCSA corporations in the definition of "Indian Tribe " in 25 U.S.C. § 5304(e) means only that that they are eligible

---

claims arising from an intertribal consortia's performance of a self-determination contract. 25 U.S.C. § 5381(b). For other claims arising from other actions, the court would simply apply the analogous multi-factor arm of the tribe test—but as suggested in *Puerto Rico Ports Authority*, if the entity is found to be an arm of the tribe under that test, the issue need not be litigated again absent a significant change in circumstances.

[114] *Lewis*, 137 S. Ct. at 1290–91.

[115] *See, e.g.*, *Oertwich v. Traditional Vill. of Togiak*, 29 F.4th 1108, 2022 WL 951272, at *10 (9th Cir. 2022). *See also* USA Br. at 17-18 (providing additional examples of sovereign immunity acting as a defense to certain claims, but not others (citing *Oliva v. Nivar*, 973 F.3d 438, 444 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 2669 (2021); 28 U.S.C. §§ 1603(b), 1605(a)(2); *Pimentel v. City of Los Angeles*, 974 F.3d 917, 928 n.5 (9th Cir. 2020) (Bennett, J., concurring))).

[116] SOA Br. 30-31.

[117] *Borer v. Eyak Corp.*, No. S-17805, 2022 WL 983436, at *4 n.14 (Alaska Apr. 1, 2022).

[118] *See, e.g.*, *Aleman v. Chugach Support Servs., Inc.*, 485 F.3d 206, 213 (4th Cir. 2007).

to contract or compact with the federal government pursuant to ISDEAA, not that they are "governments" or "federally recognized tribes."[119]

Most importantly, ANCSA corporations are eligible to compact *directly* with the federal government. There is no need for an ANCSA corporation to be "authorized" by a federally recognized tribe to carry out Title V programs, and if not authorized by a tribe, the corporation would not "have the rights and responsibilities of [an] authorizing Indian tribe" as contemplated by § 5381(b).

The remainder of the State of Alaska's arguments amount to a general complaint that federal law provides (a) for immunity from unconsented suit against federally recognized tribes and arms of those tribes and (b) that the test for determining whether a tribal entity is an arm of the tribe is fact-dependent and sometimes results in favor of immunity.[120]

Simply put, the State does not like that sovereign immunity extends to tribal organizations such as CRNA.[121] But that dispute is with the federal doctrine of tribal sovereign immunity, not with its application in this specific case. Tribal sovereign immunity "is not subject to diminution by the States,"[122] although "Congress has always

---

[119] *Yellen v. Confederated Tribes of Chehalis Rsrv.*, 141 S. Ct. 2434, 2440, 2443 (2021).

[120] *See e.g.*, SOA Br. 18-26 (discussing the *White* factors)

[121] *See, e.g.*, SOA Br. 8-11.

[122] *Douglas Indian Ass'n*, 403 P.3d at 1176 (quoting *Bay Mills Indian Cmty*., 572 U.S. at 789).

been at liberty to dispense with such tribal immunity or to limit it."[123] To the extent that the State disagrees with the application of the doctrine, its remedy lies with Congress, not with this Court.

IV. CONCLUSION

In response to this Court's invitation for amicus to participate in this matter, the United States correctly articulated the law applicable to this case. The State of Alaska did not, and proposes that the Court venture into the realms of speculation and hypothetical situations. This matter is straight-forward and simple. CRNA respectfully requests that the Court affirm the decision below, based on the facts presented.[124]

Respectfully submitted this 18th day of April, 2022 at Anchorage, Alaska

SONOSKY, CHAMBERS, SACHSE,
MILLER & MONKMAN, LLP

By: */s/ Nathaniel Amdur-Clark*
Nathaniel Amdur-Clark
Alaska Bar No. 1411111
Richard D. Monkman
Alaska Bar No. 8011101

[123] *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla*., 498 U.S. 505, 510 (1991).

[124] *Sagoonick*, 503 P.2d at 799-800.

APPENDIX A

Douglas v. Alaska Native Tribal Health Cons.*, Employer, *and Alaska Natl Ins.*, *Insurer

AWCB Case No. 200818207, AWCB Decision No. 17-0022
Filed with ACWB Anchorage, Alaska on February 21, 2017 (unpublished)

ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

BOBIE DOUGLAS, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 200818207
ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, Employer, and	)	AWCB Decision No. 17-0022 Filed with AWCB Anchorage, Alaska on February 21, 2017
ALASKA NATIONAL INSURANCE, Insurer, Defendants.	)	

Bobie Douglas's (Employee) November 9, 2015 and September 12, 2016 claims were heard on January 19, 2017 in Anchorage, Alaska. This hearing date was selected on December 9, 2016. Nelda Douglas appeared telephonically as non-attorney representative for Bobie Douglas (Employee), who also appeared telephonically. Attorney Cheryl L. Graves appeared and represented Alaska Native Tribal Health Consortium (Employer). Kristy Harvey appeared telephonically and testified for Employer. The record was held open after the hearing for the submission of additional evidence, and closed at the end of the day on January 19, 2017.

ISSUES

Employee contends she is entitled to reimbursement for travel expenses incurred when she obtained medical treatment related to a work injury. Employee contends travel from Mississippi to Alaska, and the related dining and lodging expenses were necessary for her to obtain medical

treatment. Employee further contends she is entitled to travel expenses to retrieve prescribed medications and medical supplies.

Employer contends it is not liable for the travel expenses claimed because there are physicians closer to Employee's home in Mississippi that were available to provide the same treatment. Employer contends it has already satisfied its liability by paying travel costs Employee would have incurred if she had sought treatment, medications, and medical supplies from providers closer to home.

1) **Is Employee entitled to reimbursement of travel expenses?**

Employee contends she is entitled to payment of travel expenses and admission fees for swimming pool therapy, which she contends the nature of the injury or the process of recovery requires.

Employer contends Employee's pool therapy is palliative, not medically necessary, and not prescribed under a treatment plan for a work injury. Employer contends it is not liable for Employee's costs associated with this therapy.

2) **Is Employee entitled to travel expenses and admission fees for swimming pool therapy?**

FINDINGS OF FACT

The following is established by a preponderance of the evidence:

1) On October 26, 2008, Employee reported injury to her neck and back as a result of lifting and moving patients while working for Employer. (Division ICERS Database).

2) On March 25, 2013, Employee was treated by Sean Taylor, M.D., with Alaska Spine Institute. Dr. Taylor noted Employee was medically stable, and would transition from physical therapy to a daily independent exercise program at a local gym with a pool. Dr. Taylor noted he had written an order for gym membership. (Medical Report, March 25, 2013).

3) On May 31, 2013, Employer sent a letter to Employee in response to Employee's questions. Employee had asked about medical care upon moving out of Alaska, and Employer stated she would be entitled to find a new physician at her new residence without it being a "change of

physician" under AS 23.30.095(a). Employer stated Employee was free to continue to treat with Dr. Taylor at Alaska Spine Institute, but Employer would not cover travel, room, or board costs for those visits. Employer stated it was only required to pay travel expenses to the nearest location where medical care is available. Responding to a question concerning medical stability, Employer stated that while some injured workers continue to receive medical treatment after medical stability, no physician had recommended care to improve Employee's condition, but only to help manage subjective pain complaints. (Letter from Theresa Hennemann, May 31, 2013).

4) On June 2, 2013, a compromise and release between the parties was approved. The agreement preserved Employee's entitlement to medical and transportation benefits and Employer's right to contest them. (Division ICERS Database; Parties' hearing stipulation).

5) In July 2013, Employee moved from Alaska to Brookhaven, Mississippi, where she currently resides. (Employee Letter, August 27, 2014).

6) On January 3, 2014, Dr. Taylor prescribed an independent exercise program at a gym with a pool. The prescription added that it should consist of snorkeling therapy for a period of 6-12 months. An additional note at the bottom adds that this was a maintenance/strengthening program due to the neck pain, to maintain Employee's core muscles and prevent complications. (Alaska Spine Institute Prescription, January 3, 2014).

7) On February 3, 2014, Dr. Taylor again prescribed an independent exercise program at a local gym with a pool, for 6-12 months. (Alaska Spine Institute Prescription, February 3, 2014).

8) On February 12, 2014, Employee was seen by Dr. Taylor, who stated she should continue her independent exercise program. (Medical Report, February 12, 2014).

9) On August 5, 2014, Dr. Taylor wrote a prescription for an independent exercise program at a gym with a pool, and for medical devices. (Alaska Spine Institute Prescription, August 5, 2014).

10) On June 8, 2015, Employer noted it had received Employee's list of claimed expenses but would need more information, including detailed mileage logs, billing, and proof of payments. Employer did not take a position on whether the expenses would be compensated, but stated that pool therapy was ordinarily not covered, particularly given the time elapsed since the injury. Employer noted that Employee was allowed to substitute a physician upon her move to Mississippi, and travel to Dr. Taylor's office in Alaska was not compensable. (Letter from Theresa Hennemann, June 8, 2015).

11) On July 8, 2015, Employer sent a letter to Employee stating that Employee's letter regarding pool therapy and 2014 travel to Alaska had been reviewed. Employer stated the expenses for pool therapy were insufficiently documented, and were not covered by the Act since the therapy was "palliative" because it was meant to prevent further injury. Employer stated it was paying for office visits with Dr. Taylor, and was responsible for paying transportation costs to and from the nearest location of available medical care, but would not compensate Employee for travel to Alaska. (Letter from Theresa Hennemann, June 8, 2015).

12) On August 24, 2015, Employer informed Employee by letter it had found locations nearer to her home at which she could obtain prescriptions and medical supplies. Employer located a Walgreens 4.3 miles from Employee's home, rather than the one Employee had requested mileage for, which was 30 miles away. Employer located a medical supply store that was 3.5 miles from Employee's home, rather than the 31 miles Employee had requested mileage for. Employer reiterated it would only pay travel to the nearest orthopedist, and it did not intend to cover travel to Alaska or Employee's costs associated with use of a pool. (Letter from Theresa Hennemann, August 24, 2015).

13) On September 22, 2015, Employee sent Employer a letter indicating she had not been able to locate a rehabilitation specialist who would take Alaska workers' compensation coverage. Employee wrote that the Walgreens near her home in Brookhaven "seems to be out of some . . . medications or will not fill some, due to them being written by an out of state doctor." Employee also indicated that the medical supplier Employer referred to, United Medical, did not carry the medical supplies she needed, and the closest location that did was in McComb. (Employee Letter, September 22, 2015).

14) On October 19, 2015, Employer sent Employee a letter noting that three facilities it had contacted in Mississippi had physical medicine doctors willing to treat an Alaskan injured worker: New South Neurospine (in Flowood, Mississippi), Methodist Rehabilitation Center (in Jackson, Mississippi), and St. Dominic's Medical Group (in Clinton, Mississippi). Employer noted that Employee was not required to use one of these facilities, and could continue to treat with Dr. Taylor, but stated it would pay only the mileage to one of the facilities identified, 62.6 miles from Employee's home. This distance was the furthest of the three facilities noted, although Employer maintains it was not required to use that one, and could have used the closest facility. Employer stated it would not cover therapy expenses, since it was limited to the first

year after the injury unless a treatment plan was provided, and also denied expenses for a gym membership ordered by Dr. Taylor. (Letter from Theresa Hennemann, October 19, 2015; Kristy Harvey).

15) On October 20, 2015, Employer denied Employee's requested boarding costs, explaining that nearer medical care was available that would not require an overnight stay. (Letter from Theresa Hennemann, October 20, 2015).

16) On November 9, 2015, Employee filed a claim for travel expenses, including lodging and meals, from travel for treatment with her physician in Alaska. Employee also claimed travel expenses to Walgreens in McComb, Mississippi. (Workers' Compensation Claim, November 9, 2015).

17) On November 24, 2015, Employer answered Employee's claim, stating it was not liable for Employee's travel expenses when treatment and medications were available at nearer locations, and that Employee's claimed expenses were insufficiently documented. Employer denied responsibility for palliative care and stated that gym expenses were insufficiently documented. (Answer, November 24, 2015).

18) On December 23, 2015, Employee wrote to Employer, stating that she had unsuccessfully attempted to find a physician who would accept Alaska workers' compensation coverage at multiple facilities between August, 2013, and October, 2015. These facilities were MS Sports Clinic (in Jackson, Mississippi), Methodist Rehabilitation (in Jackson, Mississippi), North Oaks Rehabilitation (in Hammond, Louisiana), Rehabilitation and Sports Medicine Center (in Covington, Louisiana), Baton Rouge Rehab Outpatient Care (in Baton Rouge, Louisiana), Touro Infirmary (in New Orleans, Louisiana), Mayo Clinic (in Rochester, Minnesota), Sage Rehabilitation Outpatient Services (in Baton Rouge, Louisiana), and MS Sports Medicine Madison Healthplex (in Madison, Mississippi). (Letter from Employee, December 23, 2015).

19) In January, 2016, Ysalina Cerdana contacted and confirmed availability of the 8 facilities Employee had stated she was unable to use in her December 23, 2015 letter. (Affidavit of Ysalina Cerdana, December 28, 2016).

20) On September 12, 2016, Employee filed a claim for travel expenses incurred in 2013 and 2014, including airline travel, lodging, meals, and mileage to the pharmacy and airport. Employee also claimed expenses associated with snorkeling therapy. (Workers' Compensation Claim, September 12, 2016).

21) On October 6, 2016, Employer answered Employee's September 12, 2016 claim, stating that the claimed costs were either not covered under the Act, or were insufficiently documented. Employer stated it had previously communicated these issues to Employee, and was unaware of any unpaid transportation costs due for the years 2013 and 2014. (Answer, October 6, 2016).

22) On October 6, 2016, Employer controverted travel expenses for 2013 and 2014 for falling outside the Act. (Controversion, October 6, 2016).

23) In December, 2016, medical providers were contacted by Angel Lincoln, and the following were found to be available and able to accept Alaska workers' compensation and a new patient: Dr. Phillip Blount (in Flowood, MS), Dr. David Collipp (in Flowood, MS), Dr. Rahul Vohra (in Flowood, MS), and Dr. Barbara Barnard (in Hattiesburg, MS). (Affidavit of Angel Lincoln, December 27, 2016).

24) In December, 2016, Ysalina Cerdana again contacted the facilities Employee stated were unavailable in her December 23, 2015 letter. Ms. Cerdana confirmed the availability of Mississippi Sports Medicine and Orthopaedic Center (in Jackson, MS) and Methodist Rehabilitation Center East Campus (in Flowood, MS), as well as North Oaks Rehabilitation Hospital (in Hammond, LA) and Lakeview Regional Medical Center (in Covington, LA), though the latter two are an inpatient facility and a hospital, respectively. (Affidavit of Ysalina Cerdana, December 28, 2016)

25) Employee testified: She had been unable to contact a doctor near her home that would accept coverage under the Alaska Workers' Compensation Act. The pool she attended was the only one she could find. The nearer medical supplier did not have the supplies she needed, and she would sometimes need to obtain supplies immediately rather than waiting for an order to arrive. (Employee).

26) During 2013 and 2014, Employee incurred a number of expenses for travel between her home and Alaska Spine Institute, travel 30 miles to Walgreens, and travel 31 miles to a medical supplier in McComb. (Employee; Employee's Spreadsheet, August 18, 2016).

27) Employee's medical treatment following her move to Mississippi was not complicated, and did not require specialty care. These appointments have generally consisted of checkups concerning pain management, blood testing, and prescriptions for medications and pool therapy. (Taylor Medical Reports, September 11, 2013, October 3, 2014; Taylor Prescription, August 5, 2014; Quest Diagnostics Report, October 7, 2014; Judgment; Observation).

PRINCIPLES OF LAW

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.030. Required policy provisions.** . . . .
>
> (1) The insurer assumes in full all the obligations to pay . . . transportation charges to the nearest point where adequate medical facilities are available . . . imposed upon the insured under the provisions of this chapter. . . .

Alcan Electric v. Bringmann, 829 P.2d 1187 (Alaska 1992), dealt with an injured worker's request for transportation out of Alaska for several medical procedures offered individually in Anchorage by at least one physician. The parties agreed "an employee is entitled to out of state medical treatment when equally beneficial treatment is not available in the employee's home state." *Id.* at 1189. *See* A. Larson, *The Law of Workmen's Compensation* § 61.13(b)(2) (1989). *Bringmann* cited *Braewood Convalescent Hospital v. Worker's Compensation Appeals Board*, 666 P.2d 14, 20 (Cal. 1983), which held "the employer must present evidence demonstrating the availability of a similar, or equally effective program in a more limited geographic area closer to [the injured worker's] domicile" to avoid paying additional transportation expenses out of state. Noting a 1988 amendment to the Act deleted the requirement an injured worker designate a licensed physician "in the state" meant the legislature intended to drop the "parochial view" that adequate medical treatment is always available in Alaska, *Bringmann* held: "If a doctor does not provide an option to the patient, regardless of the doctor's skill level, the option is unavailable to that patient." Since the employer failed to show any local surgeon offered all six surgical procedures to the employee, as did the outside surgeon, it "failed to demonstrate that 'adequate medical facilities' were available within the state." *Id.* at 1189.

Bermel v. Banner Health Systems, AWCB Decision No. 08-0239 (December 5, 2008) awarded medical transportation expenses to an injured worker who flew from Fairbanks to Anchorage for back surgery. The Anchorage surgeon was selected to perform an interbody fusion surgery, and

this procedure was not available in Fairbanks. Although the surgeon decided to abort the interbody fusion based on the employee's condition during surgery, *Bermel* held that, based on the planned surgery, adequate or similar and equally effective medical facilities were not available in Fairbanks.

> **Sec. 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.
>
> . . . .
>
> (c) A claim for medical or surgical treatment, or treatment requiring continuing and multiple treatments of a similar nature, is not valid and enforceable against the employer unless, within 14 days following treatment, the physician or health care provider giving the treatment or the employee receiving it furnishes to the employer and the board notice of the injury and treatment, preferably on a form prescribed by the board. The board shall, however, excuse the failure to furnish notice within 14 days when it finds it to be in the interest of justice to do so, and it may, upon application by a party in interest, make an award for the reasonable value of the medical or surgical treatment so obtained by the employee. When a claim is made for a course of treatment requiring continuing and multiple treatments of a similar nature, in addition to the notice, the physician or health care provider shall furnish a written treatment plan if the course of treatment will require more frequent outpatient visits than the standard treatment frequency for the nature and degree of the injury and the type of treatments. The treatment plan shall be furnished to the employee and the employer within 14 days after treatment begins. The treatment plan must include objectives, modalities, frequency of treatments, and reasons for the frequency of treatments. If the

> treatment plan is not furnished as required under this subsection, neither the employer nor the employee may be required to pay for treatments that exceed the frequency standard. The board shall adopt regulations establishing standards for frequency of treatment.
> . . . .
>
> (o) Notwithstanding (a) of this section, an employer is not liable for palliative care after the date of medical stability unless the palliative care is reasonable and necessary (1) to enable the employee to continue in the employee's employment at the time of treatment, (2) to enable the employee to continue to participate in an approved reemployment plan, or (3) to relieve chronic debilitating pain. A claim for palliative care is not valid and enforceable unless it is accompanied by a certification of the attending physician that the palliative care meets the requirements of this subsection. A claim for palliative care is subject to the requirements of (c) - (n) of this section. If a claim for palliative care is controverted by the employer, the board may require an evaluation under (k) of this section regarding the disputed palliative care. A claim for palliative care may be heard by the board under AS 23.30.110.

The above excerpts from AS 23.30.095(a) have not been modified since the date of Employee's injury. Employers are required to furnish employees injured at work medical treatment "which the nature of the injury or the process of recovery requires" within the first two years of the injury. *Philip Weidner & Associates v. Hibdon*, 989 P.2d 727, 731 (Alaska 1999). The treatment must be reasonable and necessary. *Id.*, citing *Bockness v. Brown Jug, Inc.*, 980 P.2d 462, 466.

After two years from the injury, the board has discretion to authorize "indicated" medical treatment "as the process of recovery may require"; the board is not limited to reviewing the reasonableness and necessity of the particular treatment sought, but has some latitude to choose among reasonable alternatives. *Hibdon* at 731.

> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter;
> . . . .

Medical benefits including continuing care are covered by the AS 23.30.120(a) presumption of compensability. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-665 (Alaska 1991). It also applies to the question of medical transportation expenses. *Bringmann*. *Bringmann* did not

specifically discuss how the presumption applicable to medical transportation expenses could be overcome, but held the employer must present evidence demonstrating the availability of a similar, or equally effective program in a more limited geographic area closer to [the injured worker's] domicile. An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991).

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable and the presumption is applicable to any claim for compensation under the Act. *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996). The presumption covers continuing medical care. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-65 (Alaska 1991). The presumption's application involves a three-step analysis. To attach the presumption, an injured employee must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Once the presumption is attached, the employer must rebut the raised presumption with "substantial evidence." *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). As the employer's evidence is not weighed against the employee's evidence, credibility is not examined at this stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

If the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 at 8 (March 25, 2011) (reversed on other grounds, *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016)). This means the employee must "induce a belief" in the fact-finders' minds that the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, evidence is weighed, inferences are drawn and credibility is considered. In *Lindhag v. State, Dept. of Natural Resources*, 123 P.3d 948 (Alaska 2005), the Alaska Supreme Court stated a claim can fail for "failure of proof."

"Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Miller*, 577 P.2d at 1046. Employer's evidence is viewed in isolation, without regard to Employee's evidence. *Id.* at 1055. Therefore, credibility questions

and weight accorded Employer's evidence is deferred until after it is decided if Employer produced a sufficient quantum of evidence to rebut the presumption Employee's injury entitles him to benefits. *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051, 1054 (Alaska 1994), *citing Big K Grocery v. Gibson*, 836 P.2d 941 (Alaska 1992).

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

> **AS 23.30.135. Procedure before the board**. (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

> **AS 23.30.395. Definitions.** In this chapter,
> . . . .
>
> (26) "medical and related benefits" includes but is not limited to . . . transportation charges to the nearest point where adequate medical facilities are available; . . . .
>
> (29) "palliative care" means medical care or treatment rendered to reduce or moderate temporarily the intensity of pain caused by an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal, or permanently alleviate or eliminate a medical condition; . . . .

> **8 AAC 45.082. Medical treatment.**
> . . . .
>
> (f) If an injury occurs on or after July 1, 1988, and requires continuing and multiple treatments of a similar nature, the standards for payment for frequency of outpatient treatment for the injury will be as follows. Except as provided in (h) of this section, payment for a course of treatment for the injury may not exceed more than three treatments per week for the first month, two treatments per week for the second and third months, one treatment per week for the fourth and fifth months, and one treatment per month for the sixth through twelfth months. Upon

request, and in accordance with AS 23.30.095(c), the board will, in its discretion, approve payment for more frequent treatments.

8 AAC 45.084. Medical travel expenses. (a) This section applies to expenses to be paid by the employer to an employee who is receiving or has received medical treatment.

(b) Transportation expenses include

(1) a mileage rate, for the use of a private automobile, equal to the rate the state reimburses its supervisory employees for travel on the given date if the usage is reasonably related to the medical examination or treatment;
(2) the actual fare for public transportation if reasonably incident to the medical examination or treatment; and
. . . .

(c) It is the responsibility of the employee to use the most reasonable and efficient means of transportation under the circumstances. If the employer demonstrates at a hearing that the employee failed to use the most reasonable and efficient means of transportation under the circumstances, the board may direct the employer to pay the more reasonable rate rather than the actual rate.

(d) Transportation expenses, in the form of reimbursement for mileage, which are incurred in the course of treatment or examination are payable when 100 miles or more have accumulated, or upon completion of medical care, whichever occurs first. . . .

ANALYSIS

1) Is Employee entitled to reimbursement of travel expenses?

Employee has established a preliminary link sufficient to raise the presumption with her own testimony that the travel expenses she incurred were for the purpose of obtaining treatment, medicine, and supplies related to her work injury. *Tolbert; Roger & Babler*. Employer provided evidence in the form of a letter sent by its attorney, and affidavits executed by Angel Lincoln and Ysalina Cerdana, indicating Employer had at various times made contact with multiple medical providers who indicated they were taking new patients and would accept Employer's workers' compensation coverage. This constitutes substantial evidence of available medical facilities nearer to Employee's home, and rebuts the presumption. *Braewood*. Thus, the presumption drops out, and Employee must prove, by a preponderance of the evidence, her entitlement to the benefits claimed. *Runstrom*; *Sokolowski*.

Employee does not contend that her injury requires specialized care that can only be obtained by travelling from Mississippi to Alaska. Instead, she testified she was unable to find a physician nearer to her that would accept workers' compensation coverage from Alaska. Employer's letter and affidavits weigh significantly against this, however, and indicate Employer had successfully contacted numerous medical providers that would accept Alaska workers' compensation coverage, and were accepting new patients. *Rogers & Babler*; AS 23.30.135. Among these facilities were New South Neurospine, Methodist Rehabilitation Center, and St. Dominic's Medical Group, contacted prior to Employer's October 19, 2015 letter. Also contacted and confirmed as available prior to Angel Lincoln's December 27, 2016 affidavit were Drs. Blount, Collipp, Vohra, and Barnard. Additionally, Ysalina Cerdana's December 28, 2016 affidavit indicates that in January, 2016 she contacted and confirmed availability of 8 facilities Employee had stated she was unable to use in her December 23, 2015 letter. Ms. Cerdana contacted these facilities again in December, 2016, and confirmed the availability of Mississippi Sports Medicine and Orthopaedic Center and Methodist Rehabilitation Center East Campus, as well as North Oaks Rehabilitation Hospital and Lakeview Regional Medical Center, though the latter two are an inpatient facility and a hospital, respectively. Employer's research into specific Mississippi providers occurred after the timeframe for which Employee is claiming benefits. However, it is reasonable to conclude that similar conditions existed at the time Employee was travelling to Alaska for treatment. *Id*. Employee has not proven by a preponderance of the evidence that adequate facilities were unavailable nearer than Alaska during the period of the claimed travel expenses. *Lindhag*.

Employee's travel expenses for obtaining medications and medical supplies have different considerations. Employee's testimony that the travel was necessary for her treatment is sufficient to raise the presumption. *Tolbert*. Employer located a Walgreens pharmacy and a medical supply store closer than the distance Employee claims, as indicated in the August 24, 2015 letter from Employer's attorney. This is sufficient to rebut the presumption, and the presumption drops out. *Huit.*

The only documentary evidence from Employee on this matter is in a letter indicating that the nearer Walgreens was understocked or unwilling to fill some prescriptions, and the nearer medical supplier did not carry the necessary supplies. Employee testified at hearing that the medical supplier named by Employer did not have what she needed, and her medical condition often required same-day retrieval. Employer did not address the adequacy of the nearer locations. Walgreens is a national chain, and it is reasonable to conclude that problems with obtaining medications from the nearer location could have been overcome with due diligence. *Rogers & Babler*; AS 23.30.135. These difficulties, without evidence of their burden or severity, are not sufficient to establish Employee's claimed expenses by a preponderance of the evidence, and do not prevent the nearer Walgreens from being "the nearest point where adequate medical facilities are available." *Id.*; AS 23.30.395(26); *Lindhag*. However, Employee's unchallenged testimony that United Medical did not have the needed supplies is sufficient evidence that it was not an adequate medical facility in this case. *Id.*

Because Employer has paid travel expenses as if Employee had travelled to nearer providers, Employee's claim concerning travel to Alaska and to the farther Walgreens will be denied. Employer's claim for travel expenses to the farther medical supplier will be granted.

2) Is Employee entitled to travel expenses and admission fees for swimming pool therapy?

Employee has provided prescriptions for her pool therapy, which is sufficient to attach the presumption of compensability. *Tolbert*. Employer points to the note on January 3, 2014 prescription indicating it is for maintenance and strengthening due to the diagnosis of neck pain, and argues that this is evidence that the treatment is palliative care under the Act. AS 23.30.395(29). This note provides substantial evidence to show that Employee's prescribed pool therapy is for the purpose of temporary pain reduction for an otherwise stable medical condition, and is therefore palliative in nature, and the presumption drops out. *Id.*; *Babler*; *Huit.*

The only evidence of the purpose of the pool therapy is the prescriptions of Dr. Taylor. Employee did not provide evidence indicating the therapy had a healing or curative purpose (rather than pain reduction), nor a treatment plan to support any non-palliative course of repeated

therapies. AS 23.30.095(c). Nor did she provide a certification of the attending physician indicating palliative treatment was directed towards enabling Employee to continue in her job, to participate in a reemployment plan, or to relieve chronic debilitating pain, as required by the Act. AS 23.30.095(o).

Employee has not shown by a preponderance of the evidence that she is entitled to coverage for ongoing pool therapy prescribed by Dr. Taylor. *Lindhag.* The pool therapy is found to be palliative, and Employee's claim for benefits related to the pool therapy is denied. AS 23.30.095(o). If Employee presents sufficient evidence in the future that such care is palliative but compensable, or non-palliative and in accordance with the appropriate statutes and regulations, she may file a claim.

CONCLUSIONS OF LAW

1) Employee is not entitled to reimbursement of travel expenses, except those claimed for travel to the medical supplier.
2) Employee is not entitled to travel expenses and admission fees for swimming pool therapy.

ORDER

1) Employee's claim is denied with regard to expenses associated with travel for medical treatment in Alaska, for prescription medications at the Walgreens in McComb, Mississippi, and for expenses related to Employee's pool therapy.
2) Employee's claim is granted with regard to expenses for travel to the Medical Supply in McComb, Mississippi.

Dated in Anchorage, Alaska on February 21, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Henry G. Tashjian, Designated Chair

/s/
Mark Talbert, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of BOBIE DOUGLAS, employee / claimant; v. ALASKA NATIVE TRIBAL HEALTH CONSORTIUM, employer; ALASKA NATIONAL INSURANCE, insurer / defendants; Case No. 200818207; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on February 21, 2017.

/s/
Nenita Farmer, Office Assistant